CIVIL NO. 82 6496

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CHARLES COUNSELL, Petitioner, Claimant-Appellant, vs. MUNRO-BURNS, General Contractors, Respondent, Employer Appellee, and JOHN MULLEN & COMPANY, Respondent, Insurance Carrier- Appellee.	JUDGMENT ON APPEAL FILED JANUARY 7, 1983 IN THE INTERMEDIATE COURT OF APPEALS HONORABLE JAMES S. BURNS, WALTER M. HEEN and HARRY T. TANAKA, JUDGES CERTIORARI DENIED JANUARY 5, 1983, NOTICE OF APPEAL FILED JANUARY 21, 1983 AFFIDAVIT OF SERVICE ATTACHED

FOURTEENTH AMENDMENT CONSTITUTION ISSUE
ON APPEAL FROM
THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

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Under S.C. # Rule 15.1(c)

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Under S.C. # Rule 15.1(c)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CHARLES COUNSELL, Petitioner, Claimant-Appellant, vs. MUNRO-BURNS, General Contractors, Respondent, Employer Appellee, and JOHN MULLEN & COMPANY Respondent, Insurance Carrier- Appellee.	APPEAL FROM THE DECISION AND ORDER OF NOVEMBER 18, 1980 BY LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD APPEAL FROM THE DECISION AND ORDER FILED JANUARY 7, 1983 INTERMEDIATE COURT OF APPEALS

JURISDICTIONAL STATEMENT

SUPREME COURT RULE # 15.1 (a)

And there came down armies from the Kings of the north and of the east; their agents and their stockholders were the armies, and the Kings were stockholders. And, they did change time and times; the interpretation of the laws for to take a spoil and to scorch the land.

And they did raise from the ocean floor vessels of war, of which were previously sunk by those United States constitutional torpedos, and did restore them to service as they were before, keeping them from harm and danger, from more of those torpedos, within the safety of the reefs.

This is a civil appeal and involves only questions of United States Constitution issues as applyed to the Judiciary scheme in the State of Hawaii.

It attacks the rules promulagated by the Supreme Court for the State of Hawaii of which are used in its own court and also the rules used by the State's Intermediate Court of Appeals of which are also promulagated by that Supreme Court. It also attacks the Hawaii Rules of civil procedure as they are interpreted by those courts. It specifically attacks an assignment Judge system of which is used in those courts because there is no appeal to his decisions of which are, under the rules, made as a matter of his or her personal preference.

It also attacts a memorandum opinion system of which is used in the place of "decisions of the court", and of which there is no right of appeal. These three issues colessed together and result in an open denial of any judicial review at all. The court affirmed a State of Hawaii Labor and Industrial Relations Appeals Board decision with a memorandum opinion stating it could not look at the case because of procedural errors by the appellant. They expanded the interpretations of two cases to never before thought of proportions. It then applied their meanings to time before they were made. In the case at barr they took only the property of a disabled worker giving it to some stockholders. But the system herein appealed from places in the discretion of the court the power to take any right, privalege, immunity or whatever it wishes from the citizens of the state.

ISSUES ON APPEAL

STATUTORY SCHEME

This question focuses in on some new views of which the court has put on the Hawaii Rules of Civil Procedure and

the rules of the appellant court system. Under the scheme of Judicial review, for all purposes thereto in the lives of the average person, it becomes nothing more than a discretionary grant given by the Court, and he who giveth can taketh away.

It is the position of the Petitioner-Appellant that the H.R.C.P. and the Appellant Court and Supreme Court rules are consitutionally defective, and therefore, void and illegal to use as they have been used in this case.

It is the position of the Petitioner appellant that action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 US 673, 74 L.ed. 1107. Cf. Pennoyter v. Neff, 95 US 714, 24 L. ed. 565 (1878). Also the action of state courts in enforcing a substantive common-law rule of which is formulated by the same courts.

For the Court to deny review, it is in effect a denial of the right of appeal; and this is repugnant to the Fourteenth Amendment of the United States Constitution and is as a minimum cruel and unusual punishment.

CHARACTERIZATION

General characterization called a memorandum opinion allowed under statute of which shall not be cited by a court or a party in any other action or proceding with certain exceptions and when that opinion is unapealable as a matter of right it is a denial of Judicial Review and it fails to rule the law to the facts at hand.

ASSIGNMENT JUDGE 14TH AMENDMENT

Statutory scheme which allows one standard of review to some persons and a different standard of review of others and where those determinations are unappealable and are made as matter of personal preference by an assignment judge it is a violation of the Equal Protection Clause, 14th Admendment of the United States Constitution.

S.C. RULE 15.1 (b)

There are no parties other than those names in caption.

S.C. RULE 15.1 (c)

HAS BEEN PLACED UNDER RULE 33.5

S.C. RULE 15.1 (d)

ERROR ON ITS FACE

In memorandum opinion appendix pages 10 and 11, the words appear "believing . . . that his employment . . . caused permanent total disability. pp 11". Also, "He argues that his employment . . . resulted in his permanent disability. pp 11 ". These two statements seem to appear as a result of some conclusion of law, of which were made by the Board. It reads #3. "claiments work related permanent disability is not the reason for his inability to return to work at this time. pp 11 ".

This conclusion of law could have only been made to deny a temporary total disability, medical and other benefits, since there was nothing in the form of a permanent total disability question before that board, and indeed there is no legal capacity under the rules and statutes which could have given jurisdiction for the board to have considered permanent total.

ERROR IN FINDING

Conclusion of law, 2. "claimant sustained permanent disability amounting to 10% of the whole man as a result of his employment;" Board decision appendix pp 17.

This finding appears to result from a mistake the board made in reading the disability manual themselves. They declined to receive the findings of the two medical doctors that testified.

FINDING NO. 5, PAGE 2

DECISION OF THE BOARD, APPENDIX pp. 15

Dr. Ko also testified that his medical findings were that the employment aggravated that condition which resulted in a paranoid reaction. Dr. Marvit (employer's doctor) testified that paranoid reaction did not result from schizophrenia and was not in any way aggravated by the employment.

UNEVENTFUL FINDINGS

The remainder of the orders and findings are uneventful. Petition for appeal to Supreme Court was presumed denied when certiorari was denied by that court. Motion for certiorari allowed under appellant court rules contained the Federal questions as only that court has jurisdiction over the appellant rules. These were presented inthe strongest language and form possible so the Court knew or should have known that the Federal questions were being ruled when they denied certiorari.

S..C. RULE 15.1 (e)

This case draws into question the validity of the power of the Supreme Court of the State of Hawaii to

promulagate rules, on the ground that those rules as so exercised are repugnant to the Fourteenth Amendment of the Constitution of the united States and well settled rulings of the nation's highest court.

This court has not thus far been called upon to review the rules of the recently formed State of Hawaii appellant court system, but there is a wealth of material in the case law of this court on the very issues being appealed. A leading case which covers much of the material is Shelley v. Kraemer, 334 US 1, 92 LE (ADV 845), 68 S.Ct 836, 3 ALR 2d 441. The issues are substantially a practice of open a notorious disregard of the United States Constitution and has brought to limbo the very right of access to the States Court System. This has been attained by the practice in the courts of using the devices herein appealed.

Denied access to the courts in itself may be proper in some situations, but here it is clear that the State Court # rules as exercised in the case at barr violates the terms of the fundamental charter, and it is the obligation of this courrt to so declare. The natural setting of this case must be distinguished from Zucht v. King, 260 U.S. 174, 176, 177. In that case the state courts were used to close down business competitors under the color of proclaimed rights to regulate business. In the case at barr the system herein spoken of claim rights to promulagate and interprete rules and laws in such a manner as would, which if this court agrees to it, virtually bring an end to all Federal questions and constitution appeals of any decision they

choose to make. It's literally Praise the Lord and buy a new car.

The issue to the court is not whether or not property was taken. Whatever else the appellant seeks to achieve, it is clear that the matter of primary concern is the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the state. The interpretation of the H.R.C.P., the promulagation and interpretation of the appellant system rules have acted to deny petitioner the equal protection of the laws.

Both the need and the urgency for this appeal is manifest on its face.

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals of the state of Hawaii filed on November 22, 1982, the Decision and Order of the Labor and Industrial Relations Appeals Board of the State of Hawaii, in favor of Employer-Appellee MUNRO-BURNS GENERAL CONTRACTORS and Insurance Carrier-Appellee JOHN MULLEN & COMPANY is hereby affirmed.

DATED: Honolulu, Hawaii, January 7, 1983.

ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION UNDER RULE 5

Upon consideration of appellant's motion for Reconsideration Under Rule 5 filed on December 2, 1982,

IT IS HEREBY ORDERED that said motion be and is denied.

DATED: Honolulu, Hawaii, December 16, 1982.

ORDER

The Application for Writ of Certiorari is hereby denied.

DATED: Honolulu, Hawaii, January 5, 1983.

NOTICE OF APPEAL

Filed January 21, 1983

File clerk of the Labor Industrial Relations Appeals Board,

State of Hawaii

and

Filed January 21, 1983

Filed clerk of Appellant Court System, clerk of the Intermediate Court of Appeals and the Supreme Court of the State of Hawaii.

Statute of Jurisdiction

The statute granting right of appeal is found in 28 U.S.C.A. 1257(b).

S.C. RULE 15.1 (f)

United States Consitution

The first section of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unied States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdicition the equal protection of the laws."

STATUTORY RECORD

RULE ON APPEAL

We find in the Hawaii Rules of Civil Procedure [effective July 1, 1972]:

> Rule 75. RECORD ON APPEAL TO THE SUPREME COURT
>
> (a) Composition of the Record on Appeal. The original papers and exhibits filed in the circuit court, the transcript of proceeedings, if any, and a certified copy of the docket entries prepared by the clerk of the circuit court shall consitute the record on appeal in all cases. The parties may agree, by written stipulation, filed in the circuit court, that designated parts of the record need not be transmittted to the supreme court, in which event, the parts shall be retained in the circuit court unless thereafter the supreme court shall order, or any party shall request, their transmission but the parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

IN THE INTERMEDIATE COURT OF APPEALS
OF THE
STATE OF HAWAII

MEMORANDUM OPINION

The claimant failed to designate in the record on appeal the transcript of the proceedings before the Board.[1] Without the transcript, it is impossible for this court to determine whether any of the Board's findings of fact is clearly erroneous. Under such circumstances, we are compelled to give full credence of the Board's findings which support its conclusions of law.

Affirmed

[1] A pleading entitled "Transcript of Proceedings Hawaii Rules of Civil Procedure Rule 75b" filed on December 12, 1980 by the claimant states, "There are not portions or parts thereof in transcript of proceedings or reporters thranscript etc., which appellant designates into the record." Record at 58. The Designation of Record on Appeal filed on December 19, 1980, fails to designate the transcript of the hearing before the Board. Record at 59-60.

MEMORANDUM OPINIONS

Hawaii Bar Journal

Vol. XV, No. 2, pp. 59

F. Decisions of the Court of Appeals, Their Publication and Citation

Court of Appeals Rules 19 and 20 are unique to the Court of Appeals Rule 19 specifies the required contents of memorandum decisions and describes those cases which the Court of Appeals must dispose of by memorandum opinions. They are cases in which:

(1) the issues involve only the application of well-settled rules of law to a recurring fact situation;

(2) the issue is whether the evidence is sufficient to support the jury verdict, a trial judge's finding of fact or an administrative agency finding, and the evidence is sufficient;

(3) disposition of the proceedings is clearly controlled by a prior published holding of this court deciding the case or of a higher court;

(4) a full opinion would not augment or clarify existing case law[66]

These criteria are found in subsection (b), the title of which makes clear that if any one of the criteria applies, a memorandum opinion is required.

Pursuant to subsection (c), other kinds of cases may also be disposed of by memorandum opinions. Subsection (c) does not require that the Court of Appeals dispose of any case with a full opinion; it merely provides that the court "may issue a full opinion when none of the criteria listed in subsection (b) is met." Thus the court is given

flexibility in the number of full opinions it must author. Where the court determines to prepare a full opinion, subsection (c) requires that it include "...an examination of the facts and of the contentions of the parties, and shall provide a sufficient though concise discussion of the legal authority which the court deems dispositive of the case."

Court of Appeals Rule 20(a) requires that full opinions be published. Conversely, subsection (b), which provides for the citation of memorandum opinions by a court or party only in the limited circumstances there specified,[67] clearly implies that memorandum opinions shall not be published.

66 The criteria for memorandum opinions are based upon those of Iowa S. Ct., R., Rule 9.

67 Rule 20. Publication of Opinions of Intermediate Court of Appeals, Citation of Opinion.

(b) Citation of Opinions. A memorandum opinion shall not be cited by a court or by a party in any other action or proceeding except when the opinion establishes the law of the pending case, resjudicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

Note that above reference to "a disciplinary action or proceeding" appears to be an oversight for the rules of the two courts do not elsewhere

contemplate that such proceedings will be decided by the Court of Appeals. See discussion of the concurrent juirisdiction of the two courts at Part I supra.

I. Review of Decisions of the Court of Appeals: Application for Writ of Certiorari in the Supreme Court

Supreme Court Rule 32, based on section 602-59, covers applications for writs of certiorari. The rule is unique to the Supreme Court and has no complimentary rule in the Court of Appeals. This rule, like the "transfer mechanisms" rules already discussed, is designed to minimize delays. It provides for oral argument only at the court's request, requires action by the court within a specified time period and states that the court's failure to act constitutes rejection. Like the other rules, this rule also provides that acceptance of an application is discretionary with the court and that no motion for reconsideration may be filed. After acceptance the case is re-entered upon the Supreme Court's docket pursuant to Rule 1(f), pp. 59, above.

ASSIGNMENT JUDGE

pp. 50, Hawaii Bar Journal, Vol. IV No. 2

Amended section 602-6 implicitly provides (1) that the assignment judge shall be guided by the ultimate criterion of "whether the case involves a question of such importance that it should be assigned to the supreme court," and (2) that the assignment judge in applying this criterion

may, but need not, consider certain subsidiary criteria suggested by the legislature:

> In assigning a case to the appropriate court of appeal..., the chief justice or his designee may consider the following among other relevant matters and their substantiality in determining whether the case involves a question of such importance that it should be assigned to the supreme court:
>
> (1) Whether the case involves a question of first impression or presents a novel legal question; or
>
> (2) Whether the case raises a question of law regarding the validity of a state statute, county ordinance, or agency regulation; or
>
> (3) Whether the case raises a question of law regarding the validity of a state statute, county ordinance, or agency regulation; or
>
> (4) Whether the case involves issues upon which there is a[n] [in]consistency in the decisions of the intermediate appellate court or of the supreme court; or
>
> (5) Whether the sentence in the case is life imprisonment without possibility of parole.

With respect to cases assigned to the Court of Appeals, the legislature has provided two mechanisms for the possible transfer of such cases to the Supreme Court prior to a decision by the Court of Appeals. Both types of transfer are subject to the discretionary approval of the Supreme Court. First, section 602-5(9) provides that "[t]he supreme court may order the immediate reassignment of a case to itself after its assignment to the intermediate appellate

court whenever the supreme court in its discretion deems that the case concerns an issue of imperative or of fundamental public importance." Secondly, section 602-58 provides that, prior to decision of a case, the Court of Appeals may issue a "certificate for reassignment to the supreme court" in response to "a motion . . . requesting reassignment of the case to the supreme court." "The issue of a certificate for reassignment . . . shall be discretionary upon the intermediate appellate court, and acceptance or rejection of such certification shall be discretionary upon the supreme court." It seems likely that the supreme Court would order the immediate reassignment of a case itself, or accept a certificate for reassignment, only under exceptional circumstances.

With respect to cases which have been decided by the Court of Appeals, section 602-59 provides that "a party may appeal [a Court of Appeals] decision only by application to the supreme court for a writ of certiorari, the acceptance or rejection of which shall be discretionary upon the supreme court."

pp. 54, Hawaii Bar Journal, Vol. XV, No. 2

Therefore, while preparing briefs, counsel should anticipate what transfer mechanisms might be utilized later and how the requisite documents would be constructed if the assignment judge should order the case assigned to the "wrong" court.

Another basic aspect of the criteria contained in section 602-6 and in Supreme Court Rule 27 is that they are discretionary. Both the statue and the rule utilize the word "may," not "shall." Moreover, both provide that the

assignment judge may consider, in addition to the listed criteria, "other relevant matters" as well as "the substantiality" of both the listed criteria and the other relevant matters in making the assignment determination. Thus, a case which falls within any of the listed criteria may still be forwarded to the Court of Appeals if the assignment judge deems the issues insubstantial and finds no "other relevant matters" which are substantial. Conversely, a case which falls within none of the listed criteria may still be assigned to the Supreme Court if one of the "other relevant matters" is deemed to present a substantial issue.

B. Transfer Mechanisms

While there is no appeal from the assignment judge's order, the transfer mechanisms incorporated into the new appellate system essentially afford review of the assignment decision.

Supreme Court Rule 29 (immediate reassignement) and 31 (certificate of reassignment) and Court of Appeals Rule 15 (certificate of reassignment) all expressly state there shall be oral argument only at the request of the court, that the decision of the court is discretionary, that the court shall decide within the specified time and the court's failure to act constitutes denial. Note that Supreme Court Rule 31 and Court of Appeals Rule 15 expressly state that no motion for reconsideration or appeal shall be permissable, but Supreme Court Rule 29 does not. The silence of Rule 29, however, arises not from an intent to permit a motion for reconsideration, but rather from the Supreme Court's deletion of a subsection (g) in the October 1, 1979 staff draft

which had expressly permitted the filing of a motion for reconsideration by a judge of the Court of Appeals or by a party following the action of the Supreme Court. This deletion evidences the Supreme Court's intent not to allow a petition for reconsideration.

Both Supreme Court Rule 30 (transfer by the chief justice to the Court of Appeals) and Court of Appeals Rule 16 (transfer by chief justice to the Supreme Court) specify that there shall be no review of the decision of the chief justice in either court. However, since these two rules were designed as not primarily for the use of counsel, they lack the provisions found in immediate reassignment and in certificate of reassignment for oral argument, discretion, time within which decision is to be made and the effect of no decision.

pp. 57 of above

STATEMENT OF THE CASE

S.C. RULE 15.1 (g)

This is a disputed workman compensation claim of which employer successfully defended. He obtained relief from all tort actions of which would cause him expense and inconvenience and proved a court system to be effective unto himself as well. While it appears that he lost some on the case he has never and shall never, even if this court should remand or grant some declamative relief, ever pay 10 cents of the so-called award.

The State of Hawaii Labor and Industrial Relations Appeal Board held a full denova hearing making an award, but denied all wage loss, medical costs, and all other damages.

The disabled worker appealed the decision and in his opening brief he made mention of his desire to have the case considered in the light from the United States Constitution the 5th and 14th Amendments.

The assignment judge placed the case in the intermediate court of appeals of the State of Hawaii. The worker made efforts to no avail to have the case heard under the case law of and by the Supreme Court of Hawaii.

The intermediate court quashed the appeal affirming the so-called award. They ignored U.S. Supreme Court decisions requiring that notices be given. The worker then made application via petition to the Supreme Court of Hawaii for a special statutory appeal and also filed an application for writ of certiorari. He was denied.

The intermediate court ruled that a procedural error by the worker made the quash necessary. (Opinion of Court, pp. 3.) The facts of that action, are that worker in pro-persona obtained from the Court Clerk a copy of a H.R.C.P. Rule #75 of which was written and used by the employers attorney on another of his L.I.R. appeal board cases in the Supreme Court. It was presumed to be correct because it had successfully cleared that court. The worker copied the document exactly, both in form and wording. It was this paper the court used to quash the case. Rule #75 of the H.R.C.P. doesn't invite strict scrutiny. It can be interpreted in more than one way.

The worker now prepared under the appellant rules what he knew to be a futile motion for certiorari.

He presented the assignment Judge issue, the memorandum opinion issue, as well as the H.R.C.P. issue. He

also presented the two questions he had sought to be ruled.

1. Could the Board lawfully make their own medical determination findings?

2. Could the Board lawfully withhold from using a presumption found in H.R.S. 386-85 when making a determination within the act as such?

The last page of that motion reads as follows.

> The Petitioner-Appellant at least reserved his Federal questions, expressing his desire to have issues ruled in the light of the 5th and 14th Amendments of the Consitution of the United States, in his opening brief; but unto these questions are added in this Petition, that the rules of this Court were used in an unconstitutional manner to deny a review and there is not right of appeal.
>
> It is the position of the Petitioner-Appellant that the H.R.C.P. and the appellant rules are constitutionally defective, and therefore, void and illegal to use as they have been used in this case.
>
> It is also the position of the Petitioner-Appellant that doctrine of necessity of which is used for Judges to rule issues affecting their own salaries is void as to the case at barr, and there is only one decent and proper thing, of which focuses, to do and that is that the Court should certify the Federal questions for review by the United States Supreme Court under 28 USCA 1257-(B).

The court under their rules could have rejected the motion. The routinely denied certiorari January 5, 1983 making no mention of the petition for application of review under these statutes.

Notice of appeal filed on January 21, 1983.

S.C. RULE 15.1 (h)

This statement must be read in light that appellant is in Forma Pauperis and there is not financial capacity for a certainty in oral argument required by S.C. Rule 38.1.

Motions are being prepared for filing under S.C. Rule 38 in full view of the courts reluctance to except briefs without oral argument and under S.C. Rule 46 for the appointment of an attorney as provided in 28 USC 1915. Other efforts will also be made.

This case comes out of a new appellant court system of which commenced on April 18, 1980, a paper by Matthew Goodbody and Ruth Hood, published in Hawaii Bar Journal, Vol. XV, No. 2, is placed in the appendix. This case shows how those rules skillfully used allows the powers that be to bring any Federal question, of which the two counts may be confronted, to limbo under the colors of State procedural error, and dispose of it in a Catch 22 method using a memorandum opinion. They never rule the case so how does one appeal it. It gets its power from an assignment Judge whose decisions there is no right of appeal. Those rules as used in the case at barr are a plain ursurption of power of which was never granted under the United States Constitution to either the court or the legislature. The fullness of that potential power is not manifest in the case at barr. But it is safe to say that when a fully perfected Judiciary Rule allows such power, no judge as other people should ever be put under such a temptation. This and other reasons also have been enough in the past for this court to accept briefs and hear oral arguments.

Respectfully submitted.

DATED: Honolulu, Hawaii March 30, 1983

Charles Counsell

CHARLES COUNSELL
1812-B Algaroba Street
Honolulu, Hawaii 96826

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CHARLES COUNSELL, Petitioner, Claimant-Appellant, vs. MUNRO-BURNS, General Contractors, Respondent, Employee-Appellee, and JOHN MULLEN & COMPANY, Respondent, Insurance Carrier- Appellee.	NOTICE OF APPEAL JUDGMENT ON APPEAL FILED IN LOWER TRIBUNAL S.C. RULE 28 PARA. .4(c) 28 USC § 2403(b AFFIDAVIT OF SERVICE

AFFIDAVIT OF SERVICE

I, Charles Counsell, the appellant in the above-captioned action, do make this affidavit under Supreme Court Rule No. 28 paragraph .5(c).

Both of the above-captioned appellees are represented by the same attorney whose name is prominantly placed on the fly leaf of this appeal.

That on March 31, 1983, copy of the within was delivered to Clyde S. Umebayashi, at his office, Attorney for Munro-Burns and the John Mullen & Company at his office:

300 James Campbell Building
828 Fort Street Mall
Honolulu, Hawaii 96813

It was hand-carried and delivered by myself at 3:30 p.m.

DATED: Honolulu, Hawaii, March 30, 1983.

Charles Counsell
CHARLES COUNSELL
Claimant-Appellant

82 6496

CIV. NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CHARLES COUNSELL, Petitioner, Claimant- Appellant, vs. MUNRO-BURNS General Contractors, Respondent, Employer Appellee, and JOHN MULLEN & COMPANY, Respondent, Insurance Carrier- Appellee.	JUDGMENT ON APPEAL FILED JANUARY 7, 1983 IN THE INTERMEDIATE COURT OF APPEALS HONORABLE JAMES S. BURNS, WALTER M. HEEN and HARRY T. TANAKA, JUDGES CERTIORARI DENIED JANUARY 5, 1983, NOTICE OF APPEAL FILED JANUARY 21, 1983 AFFIDAVIT OF SERVICE ATTACHED

FOURTEEN AMENDMENT CONSTITUTION ISSUE ON APPEAL FROM

THE INTERMEDIATE COURT OF APPEALS

OF THE

STATE OF HAWAII

APPENDIX UNDER SEPARATE COVER

TO STATEMENT OF JURISDICTION

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S.C. RULE # 33.5

COPY

NO. 8176

IN THE INTERMEDIATE COURT OF APPEALS

OF THE

STATE OF HAWAII

CHARLES E. COUNSELL, Claimant-Appellant, vs. MUNRO-BURNS GENERAL Employer-Appellee, and JOHN MULLEN & COMPANY, Insurance Carrier-Appellee.	CASE NO. AB 79-257 (2-79-01996) APPEAL FROM THE DECISION FILED NOVEMBER 22, 1982 BY THE INTERMEDIATE COURT OF APPEALS JUDGMENT ON APPEAL FILED JANUARY 7, 1983 IN THE INTERMEDIATE COURT OF APPEALS HONORABLE JAMES S. BURNS, WALTER M. HEEN and HARRY T. TANAKA, JUDGES

NOTICE OF APPEAL

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CHARLES COUNSELL, Petitioner, Claimant-Appellant, vs. MUNRO-BURNS, General Contractors, Respondent, Employee-Appellee, and JOHN MULLEN & COMPANY, Respondent, Insurance Carrier- Appellee.	NOTICE OF APPEAL JUDGMENT ON APPEAL FILED IN LOWER TRIBUNAL S.C. RULE 28 PARA. .4(c) 28 USC §2403(b) AFFIDAVIT OF SERVICE

NOTICE OF APPEAL

This Notice of Appeal is taken by the above-captioned Petitioner and has always been responded to and through an attorney for the other capitoned parties during and through out all of the proceedings of which were held in the administrative tribunals and the appellant courts of the State of Hawaii. The decision on appeal was filed November 22, 1982 by the Intermediate Court of Appeals and Entry of Judgment on appeal was filed January 7, 1983.

The statute granting right of appeal is found in 28 U.S.C.A. 1257(b).

JUDGMENT ON APPEAL

Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals of the State of Hawaii filed on November 22, 1982, the Decision and Order of the Labor

and Industrial Relations Appeals Board of the State of Hawaii, in favor of Employer-Appellee MUNOR-BURNS GENERAL CONTRACTORS and Insurance Carrier-Appellee JOHN MULLEN & COMPANY is hereby affirmed.

A copy of this Notice of Appeal has been filed under United States Supreme Court Rule No. 10 paragraph .3 with the clerk of the "Labor & Industrial Relations Appeal Board: for the State of Hawaii.

Under Supreme Court Rule No. 28 paragraph .4(c) [". . . shall recite that 28 U.S.C. §2403(b) may be applicable and shall be served upon the Attorney General of the State . . ."]

DATED, Honolulu, Hawaii, January 21, 1983.

Charles Counsell

CHARLES COUNSELL
1812-B Algaroba Street
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CHARLES COUNSELL, Petitioner, Claimant-Appellant, vs. MUNRO-BURNS, General Contractors, Respondent, Employee-Appellee, and JOHN MULLEN & COMPANY, Respondent, Insurance Carrier- Appellee.	NOTICE OF APPEAL JUDGMENT ON APPEAL FILED IN LOWER TRIBUNAL S.C. RULE 28 PARA. .4(c) 28 USC §2403(b) AFFIDAVIT OF SERVICE

AFFIDAVIT OF SERVICE

I, Charles Counsell, the appellant in the above-captioned action, do make this affidavit under Supreme Court Rule No. 28 paragraph .5(c).

Both of the above-captioned appellees are represented by the same attorney whose name is prominantly placed on the fly leaf of this appeal.

That on January 21, 1983, a copy of the within was delivered to Clyde S. Umebayashi, Attorney for Munro-Burns and the John Mullen & Company at his office:

300 James Campbell Bulding
828 Fort Street Mall
Honolulu, Hawaii 96813

Tony S. Hong, Attorney General for the State of Hawaii, was served a copy of the enclosed at his office located:

State Capitol
415 S. Beretania Street
Room 405
Honolulu, Hawaii 96813

It was hand-carried and delivered by myself at 3:30 p.m.

DATED: Honolulu, Hawaii, January 21, 1983.

Charles Counsell
CHARLES COUNSELL
Claimant-Appellant

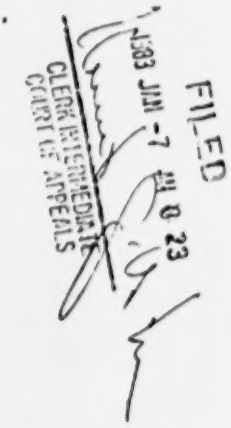
NO. 8176

IN THE INTERMEDIATE COURT OF APPEALS

OF THE

STATE OF HAWAII

CHARLES E. COUNSELL, Claimant-Appellant, vs. MUNRO-BURNS GENERAL CONTRACTORS, Employer-Appellee, and JOHN MULLEN & COMPANY, Insurance Carrier-Appellee.	CASE NO. AB 79-257 (2-79-01996) APPEAL FROM THE DECISION AND ORDER FILED NOVEMBER 18, 1980 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD



JUDGMENT ON APPEAL

WOO, KESSNER & DUCA

CLYDE UMEBAYASHI 2801-0
300 James Campbell Building
828 Fort Street Mall
Honolulu, Hawaii 96813
Tel: 524-0955

Attorney for Employer-Appellee
and Insurance Carrier-Appellee

NO. 8176

IN THE INTERMEDIATE COURT OF APPEALS

OF THE

STATE OF HAWAII

CHARLES E. COUNSELL, Claimant-Appellant, vs. MUNRO-BURNS GENERAL CONTRACTORS, Employer-Appellee, and JOHN MULLEN & COMPANY, Insurance Carrier-Appellee.	CASE NO. AB 79-257 (2-79-01996) APPEAL FROM THE DECISION AND ORDER FILED NOVEMBER 18, 1980 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

JUDGMENT ON APPEAL

Pursuant to the Memorandum/Opinion of the Intermediate Court of Appeals of the State of Hawaii filed on November 22, 1982, the Decision and Order of the Labor and Industrial Relations Appeals Board of the State of Hawaii, in favor of Employer-Appellee MUNRO-BURNS GENERAL CONTRACTORS and Insurance Carrier-Appellee JOHN MULLEN & COMPANY is hereby affirmed.

DATED: Honolulu, Hawaii, Jun. 7, 1983.

CLERK OF THE COURT

APPROVED:

Harry J. Tanaka
JUDGE

SEAL

NO. 8176

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1982

CHARLES COUNSELL, Petitioner, Claimant-Appellant, vs. MUNRO-BURNS, General Contractors, Respondent, Employer-Appellee, and JOHN MULLEN & COMPANY, Respondent, Insurance Carrier- Appellee.	CASE NO. AB 79-257 (2-79-01996) APPLICATION FOR WRIT OF CERTIORARI INTERMEDIATE COURT OF APPEALS HONORABLE JAMES S. BURNS, WALTER M. HEEN and HARRY T. TANAKA, JUDGES

FILED

1983 JAN -5 AM 9:41

Darrell M. Phillips

CLERK SUPREME COURT

ORDER

The Application for Writ of Certiorari is hereby denied.

DATED: Honolulu, Hawaii, January 5, 1983.

FOR THE COURT:

Acting Chief Justice

Charles Counsell
Petitioner,
Claimant-Appellant,
Pro Se
for the Writ.

SUPREME COURT Seal STATE OF HAWAII

NO. 8176

IN THE INTERMEDIATE COURT OF APPEALS

OF THE

STATE OF HAWAII

CHARLES E. COUNSELL, Claimant-Appellant, v. MUNRO-BURNS GENERAL CONTRACTORS, Employer-Appellee, and JOHN MULLEN AND COMPANY, Insurance Carrier-Appellee.	CASE NO. AB 79-257 (2-79-01996) APPELLANT'S MOTION FOR RECONSIDERATION UNDER RULE 5

FILED
1982 DEC 16 AM 8 51
CLERK SUPREME COURT

ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION UNDER RULE 5

Upon consideration of appellant's Motion for Reconsideration Under Rule 5 filed on December 2, 1982,

IT IS HEREBY ORDERED that said motion be and is denied.

DATED: Honolulu, Hawaii, December 16, 1982.

Charles E. Counsel,
claimant-appellant,
pro se.

James S. Burns

Walter M. Lee

Harry T. Tanaka

NO. 8176

IN THE SUPREME COURT OF THE STATE OF HAWAII

CHARLES COUNSELL, Claimant-Appellant, vs. MUNRO-BURNS GENERAL CONTRACTORS, Employer-Appellee, and JOHN MULLEN AND COMPANY, Ins. Carrier-Appellee.	CASE NO. AB 79-257 (2-78-01996)

ORDER

Appellant's Motion to Expedite Case Forward on Court Calendar is hereby denied, without prejudice to the filing of a similar motion after the appeal has been fully briefed and the case assigned to the appropriate appellate court. No further extensions will be granted for the filing of briefs.

DATED: Honolulu, Hawaii, May 22, 1981.

BY THE COURT:

William S. Richardson

Chief Justice

NO. 8176

IN THE INTERMEDIATE COURT OF APPEALS

OF THE

STATE OF HAWAII

CHARLES E. COUNSELL, Claimant-Appellant, v. MUNRO-BURNS GENERAL CONTRACTORS, Employer-Appellee, and JOHN MULLEN AND COMPANY, Insurance Carrier-Appellee.	CASE NO. AB 79-257 (2-79-01996) APPEAL FROM THE DECISION AND ORDER FILED NOVEMBER 18, 1980 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

MEMORANDUM OPINION

By its decision and order, the Labor and Industrial Relations Appeals Board (the Board) awarded to the claimant workers' compensation benefits on the basis of permanent partial disability amounting to 10% of the whole man. Believing that the Board erred in not finding that his employment with Munro-Burns General Contractors (the Employer) caused permanent total disability, the claimant appealed. We affirm.

The claimant was employed as a carpenter by the Employer for about five months until June 1975. On January 17, 1979, the claimant filed a workers' compensation claim alleging that he suffered mental distress while so employed. He claimed that the stress and strain of his job with the Employer caused his inability to work since June 13, 1975.

On August 23, 1979, the Director of Labor and Industrial Relations entered his decision denying the claim on the ground that the condition complained of did not arise out of and in the course of employment. Record at 20.

The claimant appealed the Director's decision. After a full hearing, the Board entered its decision and order (the Decision) on November 18, 1980. In its Decision, the Board found, inter alia, as follows:

> 7. While Claimant continues to have psychiatric problems which are not totally the consequence of his employment with MUNRO-BURNS, the Board finds that his condition to some extent is related to his employment.

Record at 47.

Based on its findings of fact, the Board made the following conclusions of law:

> 1. Claimant's employment with MUNRO-BURNS GENERAL CONTRACTORS in June, 1975, contributed toward his psychiatric problems;
>
> 2. Claimant sustained permanent disability amounting to 10% of the whole man as a result of his employment; and
>
> 3. Claimant's work related permanent disability is not the reason for his inability to return to work at this time.

Record at 47.

The claimant contends that the Board erred in determining that he "sustained permanent disability amounting to 10% of the whole man as a result of his employment." He argues that his employment with the Employer resulted in his permanent total disability.

The standard of review involved in this case is set forth in HRS § 91-14(g)(5) (1976). This section provides that the Board's findings, conclusions or decisions

may be reversed if they are "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." DeFries v. Association of Owners, 57 Haw. 296, 555 P.2d 855 (1976); Hamabata v. Hawaiian Insurance & Guaranty Co., Ltd., 1 Haw. App. 350, 619 P.2d 516 (1980).

The claimant failed to designate in the record on appeal the transcript of the proceedings before the Board.[1/] Without the transcript, it is impossible for this court to determine whether any of the Board's findings of fact is clearly erroneous. Under such circumstances, we are compelled to give full credence to the Board's findings which support its conclusions of law.

Affirmed.

DATED: Honolulu, Hawaii, November 22, 1982.

Charles E. Counsell,
claimant-appellant,
pro se.

Clyde S. Umebayashi
(Robert C. Kessner,
on brief) for employer-
appellee and insurance
carrier-appellee.

James S. Burns

Walter M. Heen

Harry J. Tanaka

1/ A pleading entitled "Transcript of Proceedings Hawaii Rules of Civil Procedure Rule 75b" filed on December 12, 1980 by the claimant states, "There are no portions or parts thereof in transcript of proceedings or reporters transcript etc., which appellant designates into the record." Record at 58. The Designation of Record on Appeal filed on December 19, 1980, fails to designate the transcript of the hearing before the Board. Record at 59-60.

NO. 8176

IN THE INTERMEDIATE COURT OF APPEALS

OF THE

STATE OF HAWAII

CHARLES COUNSELL, Claimant-Appellant, vs. MUNRO-BURNS GENERAL CONTRACTORS, Employer-Appellee, and JOHN MULLEN AND COMPANY Insurance Carrier-Appellee.	CASE NO. AB 79-257 (2-79-01996) APPEAL FROM DECISION AND ORDER FILED NOVEMBER 18, 1980 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

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CLERK, APPELLATE COURTS
STATE OF HAWAII

ORDER DENYING MOTION TO RETURN CASE
TO ASSIGNMENT JUDGE WITH RECOMMENDATIONS and
MOTION TO EXPEDITE CASE FORWARD ON COURT CALENDAR

NO. 8176

IN THE INTERMEDIATE COURT OF APPEALS

OF THE

STATE OF HAWAII

CHARLES COUNSELL, Claimant-Appellant, vs. MUNRO-BURNS GENERAL CONTRACTORS, Employer-Appellee, and JOHN MULLEN AND COMPANY Insurance Carrier-Appellee.	CASE NO. AB 79-257 (2-79-01996) APPEAL FROM DECISION AND ORDER FILED NOVEMBER 18, 1980 BY THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

ORDER DENYING MOTION TO RETURN CASE TO ASSIGNMENT JUDGE WITH RECOMMENDATIONS and MOTION TO EXPEDITE CASE FORWARD ON COURT CALENDAR

Claimant-Appellant's Motion to Return Case to Assignment Judge with Recommendation and Motion to Expedite Case Forward on Court Calendar filed on October 27, 1981, having been fully considered by the court,

IT IS HEREBY ordered that said motions are denied.

DATED: Honolulu, Hawaii, November 6, 1981.

Charles Counsell,
Claimant-Appellant, Pro se,
on the motion

James S. Burns

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

CHARLES E. COUNSELL, Claimant-Appellant, vs. MUNRO-BURNS GENERAL CONTRACTORS, Employer-Appellee, and JOHN MULLEN AND COMPANY, Insurance Carrier-Appellee.	)	CASE NO. AB 79-257 (2-79-01996)

DECISION AND ORDER

This workers' compensation case is before the Labor and Industrial Relations Appeals Board on appeal by CHARLES COUNSELL from the Decision of the Director dated August 23, 1979, wherein it was held that the condition for which he filed his claim did not arise out of the course of employment.

The issues before the Board are whether Claimant's psychiatric condition is work related, and the extent, if any, of permanent disability.

The parties have stipulated that the Board may receive the contents of the file in evidence.

FINDINGS OF FACT

1. On January 17, 1979, Claimant filed a claim for workers' compensation benefits alleging that he suffered mental distress while working for MUNRO-BURNS GENERAL CONTRACTORS in June of 1975. He claimed that the stress and strain of his job as a carpenter for MUNRO-BURNS is the cause of his inability to work since June 13, 1975.

2. Prior to filing for compensation, Claimant was an alcoholic who sought medical attention for memory loss and learning disability. He has an intermediate and a long term memory difficulty.

3. Dr. Jarret H. C. Ko reported that diagnoses of Claimant's condition reveal schizophrenia, residual type, and alcoholic deterioration manifested by memory and spatial relations impairment. Dr. Ko, who had been treating Claimant on a regular individual basis since October, 1978, also concluded that Claimant's condition was chronic, that his ability to relate socially was severely impaired, and that he was not capable of being regularly employed. Dr. Fred C. Evorra, a staff physician with the Veterans Administration Outpatient Clinic where he had personal contact with the Claimant, concurred with Dr. Ko's diagnoses. The Board credits these opinions.

4. Dr. Robert C. Marvit in his February, 1980, report concluded that although there was a mental disease, if not several, Claimant's condition was not in any manner related to his employment. Dr. Marvit also found that Claimant's past problem with alcoholism and his present physical condition have resulted in structural-anatomical brain impairment.

5. Dr. Ko testified that if Claimant's memory of the events surrounding his employment is accurate, he would conclude that Claimant's condition to some degree was aggravated by his employment.

6. At the hearing on the merits of his appeal and during which Claimant was represented by an attorney, the Board observed Claimant's personal appearance and demeanor and finds that he does have functional impairment. Claimant

appeared paranoid and his primary focus appeared to be focusing on the litigation at hand as a means of holding himself together.

7. While Claimant continues to have psychiatric problems which are not totally the consequence of his employment with MUNRO-BURNS, the Board finds that his condition to some extent is related to his employment.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact the Board concludes that:

1. Claimant's employment with MUNRO-BURNS GENERAL CONTRACTORS in June, 1975, contributed toward his psychiatric problems;

2. Claimant sustained permanent disability amounting to 10% of the whole man as a result of his employment; and

3. Claimant's work related permanent disability is not the reason for his inability to return to work at this time.

DISCUSSION

MUNRO-BURNS GENERAL CONTRACTORS has not overcome the statutory presumption in favor of the Claimant as set forth in Section 386-85, Hawaii Revised Statutes, and in Acoustic Insulation and Drywall vs. Labor and Industrial Relations Appeals Board, 51 H 312 (1970), which mandate that the Claimant will win unless the employer produces convincing evidence that there exists a non-compensable alternative explanation for the injury. Dr. Ko's diagnoses support finding that Claimant's psychiatric condition at least partially became symptomatic by his employment with MUNRO-BURNS GENERAL CONTRACTORS.

It is the opinion of the Board that while the presumption mandates finding that Claimant's employment contributed toward his psychiatric condition, the application of the presumption to this case does not logically necessitate assigning total liability for Claimant's inability to return to work to MUNRO-BURNS GENERAL CONTRACTORS. Instead closer examination of the case at hand requires recognition of the fact that Claimant's inability to return to work lies with his long standing alcoholism and schizophrenia. Consequently the Board has taken note of all the evidence presented in this case and thus concludes that Claimant has sustained permanent partial disability amounting to 10% of the whole man as a result of his employment.

ORDER

IT IS THEREFORE ORDERED that MUNRO-BURNS GENERAL CONTRACTORS pay Claimant for permanent partial disability amounting to 10% of the whole man.

Dated: Honolulu, Hawaii, NOV 17 1980.

YUKIO TAKEMOTO, Member

I CONCUR:

E. JOHN McCONNELL, Chairman

JAMES H. TAKUSHI, Member

Carol Kawahara

Claimant

CHARLES E. COUNSELL
1812-B Algaroba Street
Honolulu, Hawaii 96826

Employer

MUNRO-BURNS GENERAL CONTRACTORS
2005 Kalia Road
Honolulu, Hawaii 96815

Insurance Carrier

JOHN MULLEN & CO., INC.
P. O. Box 2096
Honolulu, Hawaii 96805

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION

DECISION

Case No. 2-79-01996
D/A: o/a June 1, 1975

Such investigation of the above-entitled matter having been made as he deems necessary, the Director makes the following

FINDINGS OF FACT

On January 17, 1979, Charles E. Counsell filed a claim for compensation with the Director indicating that he suffered mental distress as a result of the nature of his work with Munro-Burns General Contractors; claimant said that his troubles started when he began to work on the American Security job doing general carpentry work; after a couple of weeks, he was assigned to a blocking job and he almost immediately got into deep trouble with a couple of fellow employees; so much so, that he feared for his life; he needed the job and felt that he could not leave so he worked under these impossible conditions for about three months; claimant also stated that he was assigned to a group of nonprofessionals and that they did things on the job that affected the general safety of the entire crew; claimant said that it was impossible for him to continue to work under these conditions and so he quit the job in June of 1975; started to draw unemployment insurance as of that date; claimant contends that the stresses and strains of his job is the cause of his inability to work since June 13, 1975, and therefore, said employer should be paying workers' compensation benefits as provided under Chapter 386, HRS.

The employer denies liability on grounds that claimant's mental condition was not caused by, nor is it related, in any way, to his employment; said employer also raises the question of whether the claim was filed in time; the employer contends that the statute of limitations has run on this claim; said employer points out that the date of injury is shown as June, 1975 and the claim was not filed until January of 1979, about 4½ years later; the employer stated that they had no information or indication that claimant was injured or became ill because of his

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employment in June of 1975; it was not until January of 1979 that the employer was notified that an injury had occurred; the employer states that this is long beyond the two year limitation for filing of a written claim; the employer further points out that the claimant cannot say exactly when he became aware that his condition may be due to the conditions at work; the employer calls attention to the fact that claimant did not tell the doctor that he believed his condition to be work related; for these reasons, the employer contends that this is not a compensable claim.

Upon review of this entire matter, we find that this is not a compensable claim; medical information contained on the record indicates that claimant's condition has been diagnosed as follows: (1) schizophrenia, residual type (295.6) and (2) alcoholic deterioration manifested by memory and spatial relations impairment (291.5); the doctor also states that it is his opinion that this is a chronic condition; there is nothing on the record to show that claimant's condition was caused by or related to his employment; the onset of symptoms occurred in June of 1975, yet there is nothing in the records to show that claimant told anyone about this condition being due to his employment; there is no indication that he told his doctor about it and the record is clear that he did not report the matter to the employer until January of 1979; we find that the statute of limitations has not run on this claim; claimant was not aware that his condition might have been caused by or related to his employment until recently; claimant does not know exactly when, but when he realized that this condition could be industrial, he filed a claim shortly thereafter, so claimant is well within the time allowed by law; we further find that the condition for which claim was filed did not arise out of and in the course of his employment; the record shows that claimant's condition is chronic and has developed over a long period of time; the record also shows that claimant's problems are due to schizophrenia and alcoholic deterioration, which are both nonindustrial causes.

Thereupon the Director makes the following

DECISION

1. The condition for which claim dated January 16, 1979 was filed, did not arise out of and in the course of employment; the claim is hereby denied.

2. The claim was timely filed; the statute had not run at the time the claim was filed.

BY ORDER OF THE DIRECTOR, August 23, 1979.

Administrator

APPEAL: This decision may be appealed by filing a written notice of appeal with the Director of Labor and Industrial Relations or his county representative within twenty days after a copy of this decision has been sent.